

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE

Jesse Charles Lay
SSN XXX-XX-2665
Mailing Address: 500 Guy Walker Way,
Durham, NC 27703

Bankruptcy Case No. 10-80953

Debtor.

Jesse Charles Lay,

Plaintiff,

v.

Louis A. Trosch, Trustee; Mortgage
Electronic Registration Systems, Inc.,
Beneficiary under that Deed of Trust
Recorded at Book 5194, Page 499,
Durham County Register of Deeds;
And CitiMortgage, Inc., Lender,

Adversary Proceeding No. 10-9094

Defendants.

Motion for Judgment on the Pleadings

Mortgage Electronic Registration Systems, Inc. (MERS) and CitiMortgage, Inc. ("CitiMortgage") (collectively "Lender Defendants"), by and through counsel, move the Court, pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(c) of the Federal Rules of Civil Procedure, for Judgment on the Pleadings in their favor on the grounds that plaintiff Debtor ("Debtor") does not have standing to pursue claims pursuant to the Trustee's 11 U.S.C. § 544 avoidance powers. In support of this motion, and as set forth more fully in the Memorandum of Law filed herein, Lender Defendants show the Court the following:

1. Debtor filed this petition for relief under Chapter 13 of the United States Bankruptcy Code on May 28, 2010.

2. In his petition/schedules Debtor identified two parcels of real property on Schedule A. One parcel is identified as "House and Land, 2508 Dakota Street, Durham, North Carolina" with a value of \$130,921.00 (the "Property"). The Debtor's schedules further reflect that the Property is encumbered by a Deed of Trust in favor of CitiMortgage securing \$138,403.76.

3. On October 4, 2010, Debtor filed this adversary proceeding in which he seeks to avoid CitiMortgage's Deed of Trust, secured by the Property, pursuant to 11 U.S.C. § 544(a)(3).

4. Lender Defendants contend that the reasoning and conclusion of the *United States Supreme Court in Hartford Underwriters Insurance Company v Union Planters Bank, N.A.*, 530 U.S. 1; 120 S. Ct 1942; 147 L.Ed 2d 1 (2000), as same has been applied in numerous bankruptcy court decisions to this issue, including *Hollar v United States of America*, 174 B.R. 198 (M.D.N.C. 1994) and *Robinson v World Omni Financial Corp.*, 2011 Bankr. Lexis 437 (United States Bankruptcy Court, Eastern District of North Carolina, 2011), is controlling and that pursuant to same, a debtor, except to the limited extent authorized by §522(h) (which is not applicable to this case), can not exercise the avoidance powers of the Trustee provided in 11 U.S.C. § 544.

5. Pursuant to the Scheduling Order entered in this adversary proceeding on January 19, 2011, the deadline to seek to join additional parties was April 8, 2011. Debtor did not seek to join the Trustee as a party plaintiff within the deadline set forth in the Scheduling Order.

6. Thus, as established by the pleadings, Debtor does not have standing to pursue the adversary proceeding against the Lender Defendants.

WHEREFORE, Lender Defendants respectfully request that this Court enter Judgment on the Pleadings in their favor, dismissing the claims asserted by Debtor in this adversary proceeding.

This the 21st day of April, 2011.

HORACK TALLEY PHARR & LOWNDES, P.A.

s/Zipporah Basile Edwards

Zipporah Basile Edwards/State Bar No. 20838

Robert B. McNeill/State Bar No. 13038

Attorneys for Lender Defendants.

301 South College Street, Suite 2600

Charlotte, NC 28202-6038

Telephone: 704/377-2500

Facsimile: 704/372-2619

CERTIFICATE OF SERVICE

I, as attorney of record for CitiMortgage, Inc. and MERS, hereby certify that on the 21st day of April I served a copy of the attached Motion for Judgment on Pleadings on the following individuals electronically:

Koury L. Hicks, Esquire
The Law Offices of John T. Orcutt P.C.
1738-D Hillandale Rd
Durham, NC 27705
(919) 2861695
Email: khicks@johnorcutt.com
Attorney for Plaintiff

Dated this 21st day of April, 2011.

s/ Zipporah Basile Edwards